Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
COUNCILMAN SIDNEY LANTZ—PETITIONER

Vs.

NANCY BANKS, IN HER OFFICIAL CAPACITY
AS CLERK FOR THE CITY OF SOUTHFIELD----
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) WHETHER THE SUPREME COURT FOR THE STATE OF MICHIGAN VIOLATED THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION IN DENYING COUNCILMAN LANTZ'S APPLICATION FOR LEAVE TO APPEAL?

2) WHETHER THE SUPREME COURT FOR THE STATE OF MICHIGAN VIOLATED THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION IN FAILING TO REVERSE THE DECISION OF THE MICHIGAN COURT OF APPEALS WHICH AFFIRMED THE DISMISSAL ENTERED IN THE TRIAL COURT OF COUNCILMAN LANTZ'S COMPLAINT FOR REVIEW OF THE DISPUTED ELECTION OF NOVEMBER 2, 1999, WITHOUT DUE PROCESS OF LAW?

3) WHETHER THE SUPREME COURT FOR THE STATE OF MICHIGAN VIOLATED THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION IN FAILING TO REVERSE THE DECISION OF THE MICHIGAN COURT OF APPEALS WHICH AFFIRMED THE DECISION OF THE TRIAL COURT TO DENY COUNCILMAN LANTZ DISCOVERY PURSUANT TO MICHIGAN COURT RULE RELATIVE TO THE DISPUTED ELECTION OF NOVEMBER 2, 1999, DENYING THE APPELLANT DUE PROCESS OF LAW?

Introductory Statement:

A municipal election was decided by seventy votes. The morning after the election, one hundred eighty unopened, uncounted absentee ballots were discovered. Thirty eight

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additional absentee ballots were discovered. One Thousand One Hundred Forty Three absentee ballots remain unaccounted for. In her trial court answer, the Clerk refused to admit or deny the existence of the ballots, and refused to produce them, if she had them. The Trial Court dismissed the case and refused to permit any discovery under Michigan Court Rule. The Trial Court invented a version of facts without evidence or testimony. There was no Trial. The Court of Appeals affirmed. The State Supreme Court declined review. After the passage of twenty three months since November 2, 1999, the disputed ballots have not been produced for review. The Clerk has not had to answer one question under oath as to the whereabouts of the disputed ballots.

The failures of the Michigan State Courts to provide a forum to review this disputed election give rise to the questions of this Appeal. The doors to the Courthouses should be open for fair, and meaningful review. The integrity of our Elections is compromised if there is no "Due Process" available to review a disputed election in State Court.

The importance in maintaining the integrity of our State elections was never clearer than the 2000 Federal elections when State election officials were involved in insuring the integrity of the vote for the office of President of the United States. When a local Clerk can discriminate in the counting of ballots, and particularly, the absentee ballots, on the basis of race, sex, age, or ethnicity, there must be some forum to fairly review this process.

Councilman Lantz is a senior citizen. The absentee ballots in dispute are a core of his constituency. The failure to count these ballots; the failure for the Courts to compel the production of the disputed absentee ballots for independent inspection and review give rise to the questions raised for this appeal.

Whether the doors to the Courthouses are open for the "consumers" of justice in disputes arising from the failure to count

ballots in an election, reflect on the integrity of the Election Process itself. The failure to provide any forum for meaningful, review, reflect on the failure of our laws, or the failure of the Court system.

The doors to this Court are open to the rich and powerful. Appellant is a senior citizen, City Councilman, who brings this fight to preserve American Democracy on the salary of his Social Security and the few dollars of his wage for City Council participation. Democracy works if all of the ballots that should be counted are counted in a given election. If there is no forum to review an election dispute in a State, of these United States, that State violates Due Process of Law, and violates the underlying premise of American Democracy. If a Clerk can refuse to admit or deny the existence of ballots, and refuse to produce them, if she has them; and implicitly be allowed by Government to discriminate on the basis of age, race, ethnicity, or sex,; with no independent review of the election process in a Court of law, it is a matter for the Supreme Court. Tens of thousands of people are effected. In a Democracy, it may not matter which candidate in a particular election prevails over the course of time; but how and whether the votes are counted is of paramount importance.

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Order of the Michigan Court of Appeals entered May 8, 2001
No cite available according to the Clerk of the Court

STATEMENT OF JURISDICTION

On August 28, 2001, the Supreme Court of Michigan, the state's highest state court, issued the opinion which gives rise to this appeal. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

14TH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MCR 2.302(B)(1):

"(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

STATEMENT OF THE CASE

This appeal is taken from a Judgment of the Supreme Court of the State of Michigan, which declined review of this case on August 28, 2001. Appeal to the Supreme Court of Michigan was taken from a Judgment of the Michigan Court of Appeals dated May 8, 2001 affirming summary disposition in favor of the Defendant/City Clerk. The State Appellate Court determined that there was no genuine issue of a material fact. The State Appellate Court determined that there was no right to discovery in this disputed election case.

This case involves a 1999 local election where the outcome of the election was decided by seventy votes. The day after the election, it was discovered that over one hundred eighty absentee ballots were unopened and uncounted. Thirty Eight additional absentee ballots were later discovered unopened and uncounted. Over o thousand one hundred forty three absentee ballots remain unaccounted for.

"There is no disputer about the law." Michigan law provides that the absentee ballots have to be in the Clerk's possession at the time the polls close to be counted."

What is in dispute are matters of fact:

1) Were the one hundred eighty absentee ballots discovered the morning after the election in the hands of the Clerk prior to the close of the polls?

2) Should those disputed ballots have been counted?

3) Would counting the disputed ballots alter the outcome of the subject election?

4) Where are the 1,143 ballots which remain unaccounted for?

5) Were any of those disputed ballots in the hands of the clerk prior to the close of the polls?

6) Should those disputed ballots have been counted? And lastely:

7) Would counting of these disputed ballots alter the outcome of the subject election?

The Trial Court, the Appellate Court, and the Michigan State Supreme Court have refused pre-trial discovery. There were no interrogatory answers. There were no depositions. There was no trial. There were no witnesses. There was no evidence or vehicle to produce evidence before the Court. The ballots were never produced for an objective review to determine whether they were received by the Clerk prior to the close of the polls and proper for counting.

The Trial Court heard argument on February 9, 2000. The Clerk "neither would admit nor deny the existence of the ballots" according to the answer filed in her behalf; and refused to produce the ballots if she had them." On February 18, 2000, the Trial Judge issued an opinion, upholding the position of the Clerk.

Whether the Defendant/Clerk had the disputed ballots in its possession at the time the polls closed election day or not, will never be determined on a silent record. Absent the testimony of City workers, election workers, postal workers and a review of the disputed ballots, the truth about the election's outcome will never be known.

An election should be won or lost based on the number of votes

received by the candidates. This case should have been won or lost based on facts and evidence before the Court.

Absentee ballots are often utilized by senior citizens and those sick or disabled. They are often tabulated after the counting of the machine votes in local districts. If there is no judicial forum to challenge the counting of ballots in an election, Clerks will be accountable to no one. Any Clerk would be left to determine the outcome of an election by stopping the ballot count when one candidate or another pulled ahead.

Senior citizens have no rights to vote if their ballots are not counted. The public is denied honest government and free elections if there is not a fair process for counting the ballots and a mechanism to resolve disputed elections.

A clerk "who neither admits nor denies the existence of ballots" is suspect. A clerk "who refuses to produce ballots" if she has them, is suspect. Public confidence in the integrity of our elections and our judicial process warrant this Court's consideration.

In November, 2000, the country paid attention to the Presidential election. It was a study in politics; a study in law. The election cases moved through the counties of Florida and up and down the appellate tier. The Supreme Court of Florida became involved. Ultimately, the Supreme Court of the United States became involved.

While some in America dispute the outcome of the November, 2000 Presidential election, no one can dispute the fact that the legal process rose to meet the challenges in the State of Florida. It is a lot to ask of any state court system to address the multitude of election cases in the time frame of weeks....and yet, if called upon, that is exactly what could and did happen.

Citizens of the United States take voting seriously. We vote candidates in. We vote candidates out. We protect senior citizens voting rights and the voting rights of those sick and disabled by

offering the right to vote by absentee ballot.

This 1999 election is disputed. Thousands of citizens are effected. Ballots are in dispute. It is important for the public to know that our elections are honest. It is important for the public to know that there is a forum to bring election disputes which will resolve election conflicts in a fair and timely manner. In 23 months, there has not been one evidentiary hearing. In 23 months, there has not been a period of discovery.

When hundreds of absentee ballots are disputed and identified as uncounted; and perhaps, a thousand more such ballots remain unaccounted for, the matter should be addressed by the Courts, upon proper application. The arbitrary denial of all discovery undermines public confidence in the judicial process. The failure to consider ballots, evidence, or testimony from witnesses undermines public confidence in the judicial process. The failure to conduct a trial to determine the truth of allegations in a disputed election undermines public confidence in the judicial process.

The failure to protect the rights of senior citizens who vote by absentee ballot undermines public confidence in the integrity of our elections and democracy itself. The failure to protect the rights of those sick and disabled who vote by absentee ballot undermines public confidence in the integrity of our elections and democracy itself.

The issues before the Court have significant public interest. The case is one by a City Councilman against a City Clerk performing in her official governmental capacity. The issues involving the counting of absentee voter ballots involve legal principles and rights which are of major significance to the state's jurisprudence.

The public has a right to rely upon our Courts to resolve this public dispute. Due Process and respect for fairness should be considered a premium. If absentee ballots are not to be counted and accounted for, let it not be because of a denial of discovery;

denial of evidence; denial of witnesses; denial of a Trial. If absentee ballots are not to be counted and accounted for, let it be because they should not be counted for proper reasons.

This application is an opportunity for our Supreme Court to right the wrongs of Due Process and Fairness. The seniors and those sick and disabled who vote by absentee ballots deserve this consideration. The public deserves this consideration as it is the public who cast their collective votes. Let the review of this election be fair and open. To do otherwise compromises the integrity of our Democratic Process, and the integrity of our judicial process.

If the doors of Justice are closed at the highest levels of our judicial system to review the process by which Elections themselves are reviewed, there will be no meaningful way to insure that the government officials counting ballots in a given election do not discriminate in the counting of such ballots based on race, age, sex, or ethnicity.

Appellant brings this last appeal to this Court.

ARGUMENT FOR ALLOWANCE OF THE WRIT

If we have nothing else in America, we live in freedom. We purport to live in freedom. We purport to live in a Democracy. We purport to have elections for our governmental officials to be certain that the will of the people speak through the voice of the majority vote.

When a Clerk submits a pleading to the Trial Court "neither admitting nor denying the existence of ballots, and refusing to produce them if she has them," there is a problem with Democracy. When a Clerk can manipulate the outcome of any election by choosing to count or ignore ballots without any independent check on that process, such a Clerk can determine the outcome of any election. When a Clerk's conduct in the counting of ballots is not subject to review, a Clerk could discriminate in the counting of ballots based on race, age, sex, or ethnicity.

The threat to Democracy is not only from outsiders who would destroy Democratic institutions. The threat to Democracy comes from within when our Judicial system turns the other cheek with indifference to election controversies without regard to the consequences of this course.

In the case at bar, the Trial Court closed the door on discovery. The Trial Court allowed the Clerk to "neither admit nor deny the existence of the disputed ballots and refuse to produce them if she had them." The Trial Court protected this Clerk from answering one question under oath.

There was no trial in the Trial Court. There was no testimony taken of the Clerk, election workers, or postal workers. There was no evidence admitted into the record. The ballots were never made part of the record.

The Trial Court made findings which were unfounded, to put it politely. The integrity of the subject election as compromised.

The doors to the Courthouse were closed. The Court of Appeals did nothing to right the injustice. The Appellate Court approved the findings of the Trial Court eighteen months after the subject election, with four months until the primary election for the next vote. Short of four months thereafter, the State Supreme Court declined to review this matter, with two weeks to go before the primary election. The general election is November 6, 2001. The period of time available to review the most elections is seven to eight weeks where the vote takes place in November, and the winner takes office in the forthcoming January.

Councilman Lantz will have served a two year term from January, 2000 through December, 2001. The voters may well have given Councilman Lantz a four year term....but, without a Court willing to allow discovery to compel the production of the ballots; and without a Court willing to allow the taking of testimony; and without a Court willing to allow the admission of evidence; one will never know the outcome of this election...or for that matter, any election hereinafter.

Democracy does not work unless one is willing to count the votes honestly. The Judicial System does not work unless Courts are willing to apply due process of law to such proceedings. This is not a difficult case. The Writ of Certiorari should be granted to let the word go forth that the doors to the Courthouses in the United States are open to resolve election disputes in accordance with Due Process.

When many thousands of people take the time to vote, their expression of will should not be compromised by the failure to count certain ballots. No Clerk should be allowed to manipulate the outcome of any election, nor should any Clerk be allowed to discriminate in the counting of ballots on the basis of race, age, sex, or ethnicity.

The Writ of Certiorari should be granted and the matter set for an expeditious hearing to protect our Democratic process, and the integrity of the judicial process in the review of a disputed election. Most elections in the United States are for positions other than President of the United States. We must protect the integrity for these elections.

The following specific arguments are presented in support of the Petition for Writ of Certiorari:

Argument I: The Supreme Court for the State of Michigan violated the 14th Amendment to the United States Constitution in denying Councilman Lantz's Application for Leave to Appeal.

Argument II: The Supreme Court for the State of Michigan violated the 14th Amendment to the United States Constitution in failing to reverse the decision of the Michigan Court of Appeals which affirmed the dismissal by the Trial Court of Councilman Lantz's Complaint for review of the disputed election of November 2, 1999, without due process of law.

Argument III: The Supreme Court for the State of Michigan violated the 14th Amendment to the United States Constitution in failing to reverse the decision of the Michigan Court of Appeals which affirmed the decision of the Trial Court to deny Councilman Lantz discovery pursuant to Michigan Court Rule relative to the disputed election of November 2, 1999, denying the Appellant due process of law.

The arguments are set forth, as follows:

ARGUMENT I

THE SUPREME COURT FOR THE STATE OF MICHIGAN VIOLATED THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION IN DENYING COUNCILMAN LANTZ'S APPLICATION FOR LEAVE TO APPEAL.

The Supreme Court for the State of Michigan is the highest Court in the state. This Court declined to review an election dispute involving many thousands of its citizens who participated in an election on November 2, 1999. The population of Southfield, Michigan, involving tens of thousands of people would have to live with the results of the election, although, a dispute arose about the election's outcome.

After 23 months, there has been no trial; there has been no taking of testimony; there has been no discovery permitted; there has been no evidence admitted; and more to the point, disputed ballots have not been produced for inspection and review. There are findings of fact by the Trial court which are erroneous, and without foundation.

The Fourteenth Amendment to the United States Constitution sets forth "DUE PROCESS" and "EQUAL PROTECTION OF THE LAWS." Fundamental fairness and equal treatment under the law have been the hallmarks of the United States of America's jurisprudence....that is.....when the doors to the Court houses are open.

When it takes 23 months to go nowhere in a case; where no depositions are permitted; no interrogatories permitted; no evidence permitted; no ballots produced or review permitted; no testimony of any witnesses permitted; no trial before a trier of fact; appellate review which directs no remand to the Trial Court permitted; and no review by the State's high court permitted....the

doors to the Courthouses are closed.

When the election process appears flawed requiring an independent and responsible review, there appears to be none available in the State of Michigan. There is a plethora of cases which speak to what is meant by due process of law under the Fourteenth Amendment to the United States Constitution. One such view is set forth:

"Concededly, a "fair trial" in a fair tribunal is a basic requirement of due process." Withrow v. Larkin, 421 US 35, at 46, (1975); In Re Murchison, 349 US 133, at 136, (1955).

The facts in the case at bar, are glaring. The outcome of the November 2, 1999 election may well have been determined by a Clerk who would neither admit nor deny the existence of the ballots, and refused to produce them if she had them. This Clerk destroyed election materials relative to this election, and has not had to answer one question under oath.

The public loses confidence in their government and Democracy itself when an election can be manipulated by a Clerk with no recourse available in the state courts. The ruling of the state supreme court is a reflection of indifference shown by an overworked judicial system.

There has been no Due Process afforded Councilman Lantz. Whether there has been discrimination by the Clerk in the counting of the absentee ballots, based on age, race, sex, or ethnicity, one will not know on this record. The failure to count the remaining absentee ballots may have been done to keep the "senior vote" from Councilman Lantz, as the Councilman is a senior citizen. There will be no answers on this "silent record."

If "a "fair trial" in a fair tribunal is a basic requirement of due process", there has been no Due Process under the 14th Amendment to the United States Constitution. If there is no recourse in our Courts; if there is no Due Process of Law, there will be no le-

gitimacy to any government elected under such a process.

Thousands of citizens will look to see if there are doors to a Court open to review an election dispute. Councilman Lantz looks to this Court as the Court of last resort.

ARGUMENT II

THE SUPREME COURT FOR THE STATE OF MICHIGAN VIOLATED THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION IN FAILING TO REVERSE THE DECISION OF THE MICHIGAN COURT OF APPEALS WHICH AFFIRMED THE DISMISSAL BY THE TRIAL COURT OF COUNCILMAN LANTZ'S COMPLAINT FOR REVIEW OF THE DISPUTED ELECTION OF NOVEMBER 2, 1999, WITHOUT DUE PROCESS OF LAW.

This case involves a 1999 local election where the outcome of the election was decided by 70 votes. Councilman Lantz won a two year term, 71 votes short of the four year term. Councilman Lantz's two year term ends December 31, 2001. The day after the election, it was discovered that over 180 absentee ballots were unopened and uncounted. Over 1,000 ballots remain unaccounted for. Councilman Lantz is a senior citizen who typically receives a significant portion of the absentee voter ballots.

"There is no dispute about the law." Michigan law provides that the absentee ballots have to be in the Clerk's possession at the time the polls close to be counted.,"
(MCL 168.764B(1); MSA 6.176(2)(1).

What is in dispute are matters of fact:

A) Were the 180-218 absentee ballots discovered the morning after the election in the hands of the Clerk prior to the close of the polls?

B) Should those disputed ballots have been counted?

C) Would counting the disputed ballots alter the outcome of the subject election ?

D) Where are the 1,143 absentee ballots which remain una counted for?

E) Were any of those disputed ballots in the hands of the clerk prior to the close of the polls?

F) Should those disputed ballots have been counted; and lastly:

G) Would counting of these disputed ballots alter the outcome of the subject election?

Plaintiff/Appellant has contended and believes that all of the ballots in dispute are in the hands of the Southfield City Clerk, and were in the hands of the Southfield City Clerk on and before the close of the polls election day. Plaintiff/Appellant would support this allegation with:

a. Testimony from Postal Workers;
b. Testimony from City Clerk employees;
c. Review and production of the specific ballots in dispute;
d. Testimony from Election officials.

One piece of relevant evidence on any absentee ballot coming to the Clerk's office through the mail is the postmark. Should absentee ballots have been discovered in the post office and available to the City Clerk prior to the close of the polls, arguably, these ballots should be counted as well.

Plaintiff/Appellant was not afforded discovery of any kind. The

information provided by the postal officials came by way of affidavit on the morning of the show cause hearing of February 9, 2000. There was never an opportunity to cross examine any witnesses pertaining to any information contained in those unsubstantiated statements. Accepting those statements as true, for the sake of argument, leaves open the questions of fact about the absentee ballots themselves.

The one hundred eighty to two hundred eighteen absentee ballots identified in the Trial Court hearing may have sat for weeks in a drawer in the Clerk's office. The one thousand one hundred forty three additional absentee ballots may have a story of their own. Without discovery, and without a trial, the truth of the November 2, 1999 election will never be known. Selection rather than election will be the outcome.

To suggest that there is no genuine issue of a material fact in the case at bar is simply not the case. If the law as cited by the Appellate Court is adopted for purposes of this argument, to wit: Ritchie-Gamester v. City of Berkley, 461 Mich 73, 75-76; 597 NW2d 517 (1999), and the Court considers the lower court record, including all pleadings, affidavits, depositions (none allowed), admissions and other documentary evidence (none allowed), in a light most favorable to the non-moving party, the subject ballots would have been produced and counted. This was not done.

The dispute in this case has not been about the law. It is about facts. The absentee ballots in dispute were proper for counting, and were not counted. The Clerk would neither admit nor deny their existence, and refused to produce them if she had them.

Plaintiff/Appellant is a senior citizen who is a respected member of Council. Many of his constituents vote by absentee ballot. Summary disposition was improper in this election case where particular ballots remain in dispute, denying discovery permitted under the court rules in every other case to ascertain the truth and

particulars of the matter.

If there is no timely remedy in election cases, and no meaningful review of a disputed election, our citizens will lose confidence in their democracy; confidence in their elected officials; and confidence in their Courts.

ARGUMENT III

THE SUPREME COURT FOR THE STATE OF MICHIGAN VIOLATED THE 14th AMENDMENT TO THE UNITED STATES CONSTITUTION IN FAILING TO REVERSE THE DECISION OF THE MICHIGAN COURT OF APPEALS WHICH AFFIRMED THE DECISION OF THE TRIAL COURT TO DENY COUNDILMAN LANTZ DISCOVERY PURSUANT TO MICHIGAN COURT RULE RELATIVE TO THE DISPUTED ELECTION OF NOVEMBER 2, 1999, DENYING THE APPELLANT DUE PROCESS OF LAW.

The Trial Court erred in denying Plaintiff/Appellant discovery pursuant to MCR 2.300, et sec. Plaintiff's Motion for Production of all Absentee Ballots from the City of Southfield Election of November 2, 1999 for Inspection was denied by the Trial Court on February 9, 2000. Plaintiff's Motion to Copy Absentee Ballot Jackets from the City of Southfield Election of November 2, 1999 was denied by the Trial Court on February 9, 2000. Plaintiff's Motion to Adjourn the Balance of the Court's Order to Show Cause Pending the Completion of Discovery was denied by the Trial Court on February 9, 2000. No answer was filed by the Defendant relative to any of the above Motions notwithstanding. The relief requested in Plaintiff/Appellant's Motions was for discovery permitted by Michigan Court Rule and within the scope of said rules as previously set forth in MCR 2.302(B)(1):

"(1) In General. Parties may obtain discovery regarding any

matter, not privileged, which is relevant to the subject matter in volved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

The information requested by Plaintiff/Appellant was relevant to the subject matter involved in the pending action. Plaintiff/ Appellant would have deposed the Defendant. The disputed ballots would have been the subjects of inquiry. Where are absentee ballots kept when they come in the mail over the course of weeks. Does the Clerk's office have a separate post office box for absentee ballots, or are the ballots commingled with other City Departments' mail. Where are the one thousand plus absentee ballots, which remain unaccounted for? Why would a City Clerk neither admit nor deny the existence of the ballots and refuse to produce them if she had them? Why have the ballots not been voluntarily produced for public scrutiny? Certainly, if deposition questions would have brought answers to suggest that ballots should have been counted, or not, would have moved this election dispute toward resolution.

Denial of discovery adds to the appearance of cover up. Why would the production of disputed ballots in an election not be proper? Why would a discussion of disputed ballots in an election not be proper?

The position of the Plaintiff/Appellant has always been that ballots received by the Clerk before the close of the polls should be counted. Whether the disputed ballots were received by the Clerk

before the close of the polls was the factual issue in dispute. There was no basis for the Trial Court or the Appellate Court to deny Plaintiff/Appellant discovery.

If there is no discovery permitted in election cases; no evidence permitted; no ballots produced; no witnesses or testimony allowed; there will be no meaningful judicial remedy in Michigan relative to disputed elections.

There is a plethora of cases which speak to what is meant by due process of law under the Fourteenth Amendment to the United States Constitution. One such view is set forth: "Concededly, a "fair trial" in a fair tribunal is a basic requirement of due process." Withrow v. Larkin, 421 US 35, at 46, (1975); In Re Murchison, 349 US 133, at 136, (1955). The denial of discovery under Michigan's Court Rule is a denial of due process of law under the 14th Amendment to the United States Constitution. It is more than simple conjecture that a production of the disputed ballots; depositions of the Clerk, postal workers, and staff available to both the Post Office and the Office of the Clerk, together with the production of election records, would have brought this case a long way to settlement; to resolution; or to the point where a trial of the facts would have brought a meaningful resolution. Denial of discovery tools provided under Michigan's Court Rule was a denial of Due Process, and arguably a denial of Equal Protection under the Laws, as set forth in the Fourteenth Amendment to the United States Constitution.. Discovery is widely permitted in Michigan litigation, and the denial of such discovery raises questions of political judgments rather than legal.

CONCLUSION

There is time for this Court to act. There is time for this Court to make a stand to uphold the meaning of Democracy. There is time for this Court to affirm the meaning of Due Process and Fairness in the Courts relative to the elections which determine local governments..

Indifference is not a principle of law. There can not be findings of fact by the Court in the absence of the fact finding process. There can not be Due Process in the absence of fairness. There can not be integrity to an election when the counting of votes is controlled by a Clerk who "will neither admit nor deny the existence of the ballots, and who refuses to produce them if she has them."

If the doors to American justice are closed through indifference, it is not because Petitioner, a senior citizen, has not walked down every road of the process from the Trial Court to this High Court. As a veteran of World War II, Petitioner can only wonder how the Courts of this generation can turn their collective backs on American values of integrity in the process of democratic elections, and fairness in the Courts.

American cynicism with the Courts is heightened by the realization that the Supreme Court of the United States will hear less than ten per cent of its cases. This case is important as Due Process of Law must be applied to election cases across this country. If fundamental fairness is not to be applied in a timely manner in election cases, the reputation of our Courts and the legitimacy of our governments will suffer.

Time remains for this Court to make a difference. The public must have reason to believe that the doors to the Courthouse are open to rich and poor alike....to the mighty and to the weak. Councilman Lantz did not run for President of the United States.

Without the resources of Presidential candidates, he has come to the steps of this Court. On a Councilman's salary and Social Security, he brings his fight to insure future generations of fair elections and due process of law in their review. Councilman Lantz petitions this Court on behalf of all who care about honest elections and the integrity of the judicial process. Those who vote by absentee ballot due to age, or health reasons have a right to anticipate that these votes will be fairly and honestly counted. If the Courts are indifferent to election cases, there shall be no due process of law, and no integrity to the vote in a given election. Any Clerk will be able to manipulate the outcome of any election based on race, age, sex or ethnicity.

This Court should intercede.

RELEIF

Councilman Lantz respectfully prays:

A) That a Writ of Certiorari be ordered;

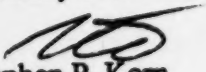
B) That the case be remanded back to the State Courts for an expeditious review of the disputed ballots;

C) That the case be remanded back to the State Courts for expeditious discovery;

D) That the case be remanded back to the State Courts for an expeditious trial;

E) That all proceedings be in accordance with Due Process of Law.

Resepctfully submitted,



Stephen P. Korn

Attorney for Petitioner, Councilman Sidney Lantz

APPENDIX A

DECISION OF THE MICHIGAN COURT OF APPEALS OF MAY 8, 2001

STATE OF MICHIGAN

COURT OF APPEALS

SIDNEY LANTZ,

Plaintiff-Appellee,

V

NANCY BANKS, In her official capacity as CLERK OF THE CITY OF SOUTHFIELD.

Defendant-Appellant.

FOR PUBLICATION
May 8, 2001
9:00 a.m.

No. 225531
Oakland County Circuit Court
No. 99-019368- AW

Before: Hood., P.J., and Doctoroff, and K.F. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from an Order summarily dismissing his challenge to the November 2, 1999 election for Southfield City Council and the trial court's denial of his motion for production of certain absentee ballots. We affirm.

I. Basic Statement of Facts and Procedural History

On November 2, 1999, an election was conducted for the Southfield City Council. According to the rules of the election, there would be four candidates elected to office. The three candidates

receiving the highest number of votes would be elected to serve four-year terms and the fourth candidate would serve a two-year term. Plaintiff finished fourth, receiving seventy fewer votes than the third place finisher. As such, Plaintiff was elected to serve for two years.

Plaintiff filed a complaint alleging that one hundred eighty absentee ballots postmarked before the close of the election were not counted; that additional ballots were unaccounted for and, the integrity of the electoral process was thereby compromised. Plaintiff further alleged that defendant failed to "call for and receive" absentee ballots from the Southfield Post Office in time to deliver them to the board of election inspectors before the polls closed on election day in violation of MCL 168.765.(3) ; MSA 6.1765(3). Plaintiff sought a writ quo warranto and mandamus compelling defendant to produce all uncounted ballots (particularly the absentee ballots), count all ballots postmarked before the close of polls on election day, and amend the election results accordingly.

The trial court granted plantiff special leave to bring his action quo warranto. In addition, the trial court ordered defendant to show cause why she should not be compelled to produce all ballots not counted on election day, count all absentee ballots postmarked on or before election day, and amend the election results in accord with the new count.

[1] *The order dismissing Plaintiff's complaint, does not indicate whether it was decided pursuant to MCR 2.116(C)(10) (no genuine issue as to any material fact) or MCR 2.116(C)(8) (failure to state a claim). Since the trial court considered documentary evidence submitted beyond the pleadings, we surmise that the trial court dismissed plaintiff's claim on the authority of MCR 2.116(C)(10). We review the trial court's decision accordingly.*

At the show cause hearing, defendant submitted threee separate affidavits establishing that on election day: (1) a representative from the City of Southfield picked up the mail, which included

Absentee ballots, from the Southfield Post Office at approximately 8:00 a.m.[2], (2) the Deputy Clerk received the ballots from this mail run at approximately 8:30 a.m. (3) the Postmaster directed the supervisor in charge of mail processing in Southfield to advise the Postmaster if any ballots or first class mail were available from the 1:30 p.m. delivery; (4) no absentee ballots were available from the 1:30 p.m. delivery time; and (5) even if the Southfield City Clerk phoned the post office between the 8:00 a.m. post office pick-up and before the polls closed, there would not have been any absentee ballots for the city to receive. The plaintiff did not contest the statements contained in these sworn affidavits, instead arguing that the postmark controlled the absentee ballots' eligibility to be counted. The trial court held that the receipt by the clerk of the actual ballot, rather than the postmark controlled and dismissed plaintiff's complaint in its entirety.

[2]The affidavits also established that ballots are delivered via first class mail. At the Southfield Post Office, mail is delivered three times during the day: 5:30 a.m., 7:30 a.m. and 1:30 p.m. The morning deliveries account for the principal source of first class mail prepared for pick-up. The afternoon delivery is much smaller and typically does not include any first class mailings.

II. Standard of Review

A trial court's grant or denial of summary dismissal is reviewed de novo by the Court. *Cork v Applebees of Michigan, Inc.*, 239 Mich App 311, 315; 608 NW2d 62 (2000). When reviewing a trial court's grant of summary disposition pursuant to MCR 2.116 (C)(10), this Court must consider the lower court record, including all pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the non-moving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 75-76; 597 NW2d 517 (1999). Pursuant to the dictates of MCR

2.116(C)(10), where the evidence establishes that there is no genuine issue as to any material fact, the movingparty is entitled to judgment as a matter of law, and the trial court may summarily dismiss plaintiff's cause of action. *Smith v Globe Life Ins Co,* 460 Mich 466, 454-455; 597 NW2d 28 (1999).

III. Plantiff's Contentions

A. Ballots Postmarked On or Before Election Day

Plaintiff first contends that any ballot postmarked on or before the close of polls on election day must be counted and defendant's failure to do so rendered the election invalid. Plaintiff's position is without merit.

The absentee ballot provisions of Michigan election law are specific. MCL 168.764b(1); MSA 6.176(2)(1) provides that "an absent voter's ballot shall be delivered to the clerk only as authorized in the instructions for an absent voter provided in Section 764a'. MCL 168.4a; MSA 6.1764(2) provides in relevant part:

> The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls onelection day. *An absent voter ballot received by the clerk or assistant of the clerk after the close of polls on election day will not be counted.*

The clear language of these statutes indicate that actual receipt of an absentee ballot is paramount. To "receive" the absentee voter ballots presupposes that they are physically in the possession of the clerk or an authorized assistant. If the absentee voter ballot does not reach either of these individuals before the close of polls on election day, they cannot be counted irrespective of the date displayed in the postmark. By suggesting that the date contained

in the postmark should govern, plaintiff ignores the plain language of the statute and attempts to create an ambiguity where none exists. The statute at issue is clear and unequivocal thus, "[l]eav[ing] no room for judicial construction." People v McIntire, 461 Mich 147; 599 NW2d 102 (1999) (citation omitted). The role of the judiciary is to apply the terms of the stature as enacted by the Legislature lest "[a] court ...impermissibly substitute [] its own policy preferences." *Id.*

In the case at bar, the uncontroverted evidence established that on November 2, 1999, after a representative from the city picked up the regular morning mail, there were no additional ballots to pick up before polls closed at 8:00 p.m. The evidence further established that if the post office had received additional ballots after the regular morning pick up, the Postmaster would have phoned the city clerk and made arrangements to deliver the ballots received. Accordingly, the evidence established that defendant received all of the ballots from the post office on election day. Plaintiff conceded these facts. When presented with documentary evidence, plaintiff is not entitled to rely on the bald allegations in the pleadings alone but rather, must come forth with some documentary evidence to demonstrate a genuine factual issue for the court to resolve.[3] Plaintiff failed to do so. Since plaintiff does not claim that the city clerk failed to "deliver" the absentee ballots "received" from the post office to the election inspectors before the polls closed, there is no genuine issue as to any material fact and summary disposition in favor of defendant was therefore warranted.[4] The statutes specifically provide a deadline for absentee ballots based upon the physical receipt of the ballots. The trial court correctly determined that a postmark, standing alone, is irrelevant , and that only those ballots in defendant's possession before the close of polls were eligible to be counted.

[3]*See AFL-CIO v Civil Service Comm, 191 Mich App 535;478 NW2d 722 (1991) (stating that a motion pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim and dismissal is appropriate where the party opposing the motion "rests upon the mere allegations or denials in the pleadings... ') In the case at bar, the February 9, 1999 hearing was not a motion for summary disposition brought by defendant but was rather a show cause hearing on plaintiff's complaint. Nevertheless, plaintiff is still required to demonstrate a genuine factual dispute justifying a trial.*

[4]*Plaintiff states that "in the absence of discovery plaintiff believes that...all of the ballots in dispute are "in the hands of the Southfield City Clerk and were in the hands of the Southfield City Clerk on and before the close of the polls... " Plaintiff did not make this allegation during the hearing on February 9, 1999, but instead raises it for the first time on appeal. Issues raised for the first time on appal are not properly preserved and thus, "not subject to review" save for "exceptional circumstances." On the record here before us, we do not discern any "extraordinary circumstances' requiring us to abandon this cardinal rule. See Booth Newspapers, Inc. v University of Michigan Bd of Regents, 444 Mich 211,234 n 23; 507 NW2d 422 (1993) (noting that the Court "has repeatedly declined to consider arguments not presented at a lower level, including those relating to constitutional claims.")*

B. The Requirement to "Call For and Receive" Ballots

MCL 168.765(3); MSA 6.1766 states in relevant part:

the city...clerk, or authorized designee of the clerk *shall call fo and receive absent voter ballots from the post office* at which the city...clerk regularly receives mail addressed to the city...on election day in sufficient time to deliver any envelopes containing absent voter ballots to the board of election inspectors before the close of the polls.

Plaintiff argues that the defendant had an affirmative duty to "call for and receive" absent voter ballots from the post office in sufficient time to deliver them to the board of election inspectors before the polls closed and she failed to do so. Although defendant did not "call for" absentee voter ballots from the post office, the

uncontested evidence adduced at the hearing established that after the 8:00 a.m. morning mail pick-up , no other absentee ballots came into the post office for delivery to the city clerk. Moreover, the evidence established that if indeed absentee voter ballots were received at the post office by virtue of the afternoon mail delivery on November 2, 1999, the post office would have called the city to "ascertain where the ballots should be delivered." The defendant's definitively established that there were no ballots to deliver. Accordingly, there was no genuine, material factual issue precluding summary disposition.

C. Production of Ballots

Plaintiff finally argues that the trial court erred when it denied Plaintiff's Motion for Production of All Absentee Ballots From the City of Southfield Election of November 2, 1999 for Inspection. A trial court's decision to deny discovery will not be overturned absent an abuse of discretion. Baker v Oakwood Hospital Corp, 239 Mich App 461, 478; 608 NW2d 823 (2000).

In the case at bar, the trial court did not abuse its discretion when it denied plaintiff's discover requests. Plaintiff does not allege or otherwise argue that the uncounted absentee ballots requested actually reached the city clerk's office before the polls closed on election day but were not delivered to the board of election inspectors for counting. In fact, plaintiff submits that absentee ballots postmarked on or before November 2, 1999 should be counted regardless of when the city clerk actually receives them. Plaintiff's position flies in the face of the clear and unambiguous language employed in the statutes and the uncontested facts adduced at the February 9, 1999 hearing. The information sought by plaintiff in discovery is not even marginally relevant considering the applicable law discussed herein. Accordingly, the trial court

did not commit error requiring reversal by denying plaintiff's request for discovery.

Affirmed.

/s/ Harold Hood
/s/ Martin M. Doctoroff
/s/ Kirsten Frank Kelly

APPENDIX B

DECISION OF THE OAKLAND COUNTY CIRCUIT COURT
OF
FEBRUARY 18, 2000

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SIDNEY LANTZ,
Plaintiff,

Vrs.

Case no. 99-019368 AW
Judge Nanci J. Grant

NANCY BANKS, IN HER OFFICIAL CAPACITY AS CLERK FOR THE CITY OF SOUTHFIELD,
Defendant.

_____/

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_____/

OPINION AND ORDER

At a session of said Court, held in the Courthouse in the City of Pontiac, County

of Oakland, State of Michigan on the 18th
day of February, 2000.

PRESENT: HONORABLE, CIRCUIT JUDGE

This matter, having come before the court on Plaintiff's motion for production of documents, said motion is DENIED and the action is DISMISSED.

The following facts are undisputed. On November 2, 1999, the predecessor Clerk for the City of Southfield City Counsel conducted an election, which included the race for Southfield City Council. At approximately 8:00 a.m. on November 2, 1999, the United States Post Office delivered to the City Clerk all absentee ballots received by that time. The Post Office made no other deliveries of absentee ballots that day, nor did the City Clerk contact the post office to inquire into whether additional ballots had arrived.

The City Council election was close, with only a 70-vote difference between third and fourth place. Plaintiff then discovered that the City had received at least 180 absentee ballots after the polls closed, which were not counted in the election. Moreover, those ballots were postmarked on November 2, 1999. Thus, Plaintiff filed suit to challenge the election, arguing that the absentee ballots postmarked on election day should have been counted in the election.

In this motion, Plaintiff seeks an order compelling production and/or copying of all absentee ballots and ballot jackets. In response, Defendants assert not only that the motion should be denied, but also that Plaintiff's claim should be dismissed in its entirety.

In considering this motion, the Court must first address the legal theories under which Plaintiff brings his claim. In support of its application for action quo warranto, Plaintiff asserts that an absentee ballot must be counted so long as it is postmarked on the date of the election, regardless of where that post mark originated or

whether the ballot was received by the Clerk before the poles close. The Court disagrees. The absentee ballot provisions of Michigan election law, MCL 168.758-168.769a, provide a detailed description of the procedures for absentee voting, and do not contain such a provision regarding postmarks. In fact, MCL 168.764a explicitly provides: "The ballot must reach the clerk or an authorized assistant of the clerk before the close of the polls on election day" and "an absent voter ballot received by the clerk or assistant of the clerk after the close of the polls on election day will not be counted." In this context, the Court finds Plaintiff's interpretation to be untenable. Rather, the postmark is irrelevant, and an absentee ballot must be counted only if it reaches the clerk before the close of polls on election day.

Plaintiff also argues that the Clerk did not comply with MCL 168.765. Specifically, subsection (3) requires the City Clerk to "call for and receive absent voter ballots from the post office...on election day in sufficient time to deliver any envelopes containing absent voter ballots to the board of election inspectors before the close of the polls." Plaintiff claims that the City Clerk did not comply with this subsection because she did not take any steps to receive absentee ballots from the post office after receiving the 8:00 am mail delivery on election day. The Court disagrees. Specifically, the Court finds that the Clerk satisfies his or her obligations under the statute by accepting the Post Office's regularly scheduled election day mail delivery.

In light of the foregoing, the Court sees no way that Plaintiff can prevail even if absentee ballots were delivered to the post office on November 2, 1999, after the 8:00 am mail delivery to the City. Therefore, Plaintiff's current motion is denied, and the action is dismissed.

CIRCUIT JUDGE

APPENDIX C

DECISION OF THE MICHIGAN SUPREME COURT OF
AUGUST 28, 2001
DENYING REVIEW

ORDER
Entered: August 28, 2001

Michigan Supreme Court
Lansing, Michigan

SIDNEY LANTZ,
Plaintiff-Appellant,

V

SC: 119260
COA: 225531
Oakland CC: 99-019368-AW

SOUTHFIELD CITY CLERK,
Defendant-Appellee.

On order of the Court, the motion for immediate consideration is GRANTED. The Application for leave to appeal from the May 8, 2001, decision of the Court of Appeals, is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to strike is also considered, and it is DENIED as moot.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

August 28, 2001

Corbin R. Davis
Clerk